NATURE OF CHARGE: Adulteration, Section 501 (c), the strength of the product in the February 1949 shipment differed from that which it purported and was represented to possess. The label represented that each tablet contained 0.75 mgm. of epinephrine bitartrate, equivalent to 0.4 mgm. (1/166 grain) of epinephrine bitartrate, and that 1 cc. of a solution containing one tablet of the article would equal a solution containing 1 part of epinephrine bitartrate per 2,600 parts of the solution. However, each tablet of the article contained less epinephrine bitartrate than so represented, and 1 cc. of a solution containing 1 tablet of the article would equal a solution containing less than 1 part of epinephrine bitartrate per 2,600 parts of the solution.

Misbranding, Section 502 (a), the statements on the label of the article in the October shipment "Each Tablet Contains: 0.4 mgm. (1/166 grain) Epinephrine Bitartrate * * * 1 tablet in 1 cc. equals 1: 2600 Solution" were false and misleading since the product contained less epinephrine bitartrate than stated and implied. Further misbranding, Section 502 (a), the statement "U. S. P." on the label of the article was false and misleading since it represented that the article was a drug the name of which is recognized by the United States Pharmacopoeia, whereas the article was not a drug the name of which is recognized by the United States Pharmacopoeia.

DISPOSITION: May 25, 1951. Pleas of nolo contendere having been entered, the court imposed a fine of $2 against the partnership and $50 against the individual.

3452. Adulteration and misbranding of Ido-Pheno-Chon. U. S. v. 11 Cases * * *. Motion for removal denied (94 F. Supp. 925). Consent decree of condemnation. (F. D. C. No. 27921. Sample No. 50524-K.)

LIBEL FILED: November 18, 1949, District of Oregon.

ALLEGED SHIPMENT: On or about August 19, 1949, by the Pyo-Gon Laboratories, from Los Angeles, Calif.

PRODUCT: 11 cases, each containing 12 6-ounce bottles, of *Ido-Pheno-Chon* at Portland, Oreg.

NATURE OF CHARGE: Adulteration, Section 501 (c), the strength of the article differed from that which it purported to possess, namely, "bacteriostatic solution."

Misbranding, Section 502 (a), the following label statements were false and misleading since the article was not bacteriostatic: (Bottle label) "For Dental and Oral Use Bacteriostatic Solution" and (carton label) "For Dental and Oral Use Bacteriostatic Solution * * * to markedly inhibit certain bacterial infections * * * Ido-Pheno-Chon, due to its high bacterio-static properties, aids in the management of gum infection and in control of other mouth infections. Its effectiveness has been attested in actual case histories."

DISPOSITION: On or about February 9, 1950, the Pyo-Gon Laboratories, claimant, filed a motion for removal of the libel action to another jurisdiction; and on August 31, 1950, after consideration of the briefs and arguments of counsel, the court handed down the following opinion in denial of the motion:

FEE, *Chief Judge:* "A libel was commenced against certain goods shipped into this District from a point within the Southern District of California and found here. The charge is misbranding and adulteration. The goods were seized. Thereupon, claimant made a motion to transfer the cause to the Southern District of California or, if that be denied, to a district adjacent thereto.

"The problem raised by the motion is assumed to be of easy solution. For a District Court burdened with work, any move to remove a cause elsewhere is to be welcomed as a relief of some of the burden. But there is always the serious question of power. Simply because the final problem is one of place of trial, it is generally believed only venue is involved. But actually there is a transfer of jurisdiction. This Court, by virtue of the filing of the libel, now has jurisdiction of the proceeding. By the seizure, this Court has jurisdiction of the res.

"The District Courts of the United States were not created as units of one vast continental judicial system. Each has been organized by special statute as a court of the judicial system of the state in which it exercises power. A District Court is a separate entity. No District Court has jurisdiction crossing a state boundary. By virtue of these limitations, the transfer of any cause from one district to another is a question of power. No District Court has such inherent authority. There must be an express statutory grant[1] as a condition precedent to the initiation of the transfer. Furthermore, every essential factor must be present or the District Court to which the papers are sent will not acquire jurisdiction.[2] Unquestionably, these difficulties become manifold when a res is within the possession of the court where the libel is filed.

"The question of whether a res once under the jurisdiction of one District Court can be validy transferred to another is, of course, fundamental. It strikes at the proposition that local suits, such as mortgage foreclosure and real actions, can be tried only in the courts of the state where the real property is situate.[3] If this barrier is swept away for mere convenience of some California corporation, local autonomy will end. This will no longer be an indivisible union of indivisible states.

"However this may be, the existence of the power of transfer is jurisdictional and may only be exercised in strict accordance with the statutory grant.

"Title 21 U. S. C. A. § 334 (a) gives the power to transfer a single libel action where the charge is misbranding. But the charge here is adulteration and misbranding. There is no authority here for transfer.[4]

"Title 28 U. S. C. A. § 1404 (a) gives power to transfer any civil action to any district where it might have been brought. This action could only have been brought in Oregon, because here alone was the res 'found.' Title 21 U. S. C. A. § 334 (a); Title 28 U. S. C. A. § 1395 (d), New Judicial Code.

"Title 28 U. S. C. A. § 1404 (b) provides for transfer of an in rem proceeding from one division of the same district to another division. This is, of course, permissible because the same District Court retains jurisdiction of the res. The provision would be of doubtful validity otherwise. But the language does not permit transfer of a res in judicial custody of one District Court to another, as is sought here.[5]

"Since no statutory provision exists, this Court is without power to initiate the transfer. No other District Court has jurisdiction to hear the cause if transfer issue.

"The motion is denied."

On February 12, 1951, the Pyo-Gon Laboratories having consented to the entry of a decree, judgment of condemnation was entered and the court ordered that the product be released under bond for relabeling, under the supervision of the Federal Security Agency.

---

[1] Brown vs. Heinen, 61 F. Supp. 563, 564.

[2] Petition of Mundorff, 8 F. R. D. 7, 9.

[3] In such cases, the want of jurisdiction of the subject matter cannot be waived by appearance or consent. Thus in Ellenwood vs. Marietta Chair Co., 158 U. S. 105, the Court says: "The entire cause of action was local. The land alleged to have been trespassed upon being in West Virginia, the action could not be maintained in Ohio. The Circuit Court of the United States, sitting in Ohio, had no jurisdiction of the cause of action, and for this reason, if for no other, rightly ordered the case to be stricken from its docket, although no question of jurisdiction had been made by demurrer or plea."

[4] United States vs. 74 Cases, Each Containing 48 Cans of C. C. Brand Oysters, 55 F. Supp. 745, 746.

[5] United States vs. 23 Gross Jars, More or Less, of Enca Cream, 86 F. Supp. 824, 825.